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No. 06-1164

# In the Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals erred by addressing the timeliness of petitioner's complaint even though the government did not argue on appeal that the suit was barred by the six-year limitations period contained in 28 U.S.C. 2501.

2. Whether the court of appeals erred in holding that petitioner's complaint was time-barred.

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 457 F.3d 1345. The opinion of the Court of Federal Claims (CFC) (Pet. App. 41a-126a) following a bench trial is reported at 62 Fed. Cl. 556. The opinion of the CFC on cross-motions for summary judgment is reported at 60 Fed. Cl. 230. The opinion of the CFC (Pet. App. 127a-154a) on the United States' motion for judgment on the pleadings or, in the alternative, for summary judgment is reported at 57 Fed. Cl. 182.

## JURISDICTION

The judgment of the court of appeals was entered on August 9, 2006. A petition for rehearing was denied on November 30, 2006 (Pet. App. 155a-156a). The petition

for a writ of certiorari was filed on February 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner's complaint alleged that the United States had physically taken petitioner's leasehold, without paying just compensation, during the remediation of a hazardous waste site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* The CFC dismissed a portion of petitioner's complaint, holding that it was barred by the six-year statute of limitations contained in 28 U.S.C. 2501. Pet. App. 150a. After a bench trial on liability with respect to the remainder of petitioner's complaint, the CFC entered judgment for the United States. *Id.* at 113a-114a. The court of appeals vacated and remanded with instructions to dismiss, holding that the CFC lacked jurisdiction over the entirety of petitioner's suit because petitioner's claims had accrued more than six years before the complaint was filed. *Id.* at 1a-40a.

1. In 1969, petitioner entered into a 50-year sand and gravel lease that granted it the exclusive right to mine marketable stone and gravel on a 158-acre parcel of land (the Site) in Lapeer County, Michigan. Pet. App. 2a-3a. The Site contained a landfill that operated from 1955 until 1980. *Id.* at 3a-4a, 45a. While it was in operation, the landfill illegally accepted drums of liquid industrial waste and twice caught fire. *Id.* at 4a; C.A. App. 1796-1799, 1994, 2005, 2014, 2320.

Petitioner and the landfill's operator entered into a cooperative arrangement. Under that arrangement, the operator notified petitioner when it located "good" sand

or gravel in the course of digging for the landfill so that petitioner could remove the sand or gravel. Pet. App. 66a. Petitioner, in turn, conducted its mining operations slightly ahead of the growing landfill, leaving empty space that could be filled with garbage. *Ibid.* On at least two occasions, petitioner's president observed trucks dumping barrels into the landfill. *Id.* at 67a-69a.

In 1986, the United States Environmental Protection Agency (EPA) issued its initial remedy for excavating and removing the contaminated drums at the Site. Pet. App. 4a. In 1990, EPA issued its decision for remediation of the groundwater contamination and capping of the landfill. *Id.* at 4a-5a. During the winter of 1992-1993, in connection with the 1990 decision, EPA erected a chain link fence that enclosed approximately 60% of the Site. *Id.* at 5a. In February 1994, EPA constructed a new internal security fence that "encompassed the overwhelming portion of [petitioner's] leasehold." *Id.* at 6a. Over the following years, EPA moved the fence on several occasions, with the relocations typically resulting in a reduction of the area encompassed. *Id.* at 5a-7a.

In May 1998, the fence was realigned, enclosing the Area of Institutional Controls (AIC), an area to protect individuals from future exposures and ensure the integrity of the landfill cap system. Pet. App. 6a; C.A. App. 3106. The May 1998 fence remained in place throughout the construction of the landfill cap. *Id.* at 1426-1427. In December 2003, EPA moved the fence inward to enclose a smaller area, which currently comprises the AIC and includes the landfill cap system. Pet. App. 90a. During the relevant period, petitioner repeatedly interfered with EPA's remediation activities at the Site. See *id.* at 6a; C.A. App. 1499-1511, 3574-3582.

2. In May 2002, petitioner filed suit in the CFC, alleging a taking of its leasehold and seeking just compensation. Pet. App. 7a. Petitioner alleged "that the EPA's construction of the landfill cap, occupation of the AIC, construction of fences and access roads, and installation of groundwater monitoring wells amounted to a permanent physical taking." *Ibid.* The government moved for judgment on the pleadings or, in the alternative, for summary judgment. The government argued that petitioner's suit was barred by 28 U.S.C. 2501, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The United States contended that petitioner's claim had accrued during the winter of 1992-1993 when EPA had erected fences on the property, and that the 2002 complaint was therefore untimely. Pet. App. 129a-133a.

The CFC granted the government's motion in part and denied it in part. Pet. App. 127a-154a. The CFC concluded that petitioner's takings claim had accrued on the "date on which [petitioner's] property ha[d] been clearly and permanently taken," and that the government had "failed to demonstrate that it 'destroyed' [petitioner's] right to possess, use, or dispose of the [Site] or the [AIC] upon construction of fences in the winter of 1992-1993." *Id.* at 136a, 141a-142a (quoting *Hornback* v. *United States*, 52 Fed. Cl. 374, 377 (2002)). The CFC held, however, that petitioner's claim with respect to areas covered by permanently installed monitoring wells that had not been abandoned was time-barred. *Id.* at 143a.

The parties then filed cross-motions for summary judgment on the merits. The government argued that,

under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), it had not taken any Fifth Amendment-protected property interest of petitioner because petitioner's mining in the AIC was barred by pre-existing background principles of state nuisance and property law. The CFC "agreed with the government's contention that background principles of Michigan nuisance and property law limit the scope of compensable property interests in a physical takings case such as [petitioner's]," Pet. App. 9a, but it found the record as to the applicable "background principles" insufficient to grant the government's motion for summary judgment, see *id.* at 9a-10a.

After a bench trial on liability, the CFC entered judgment for the government. Pet. App. 41a-126a. The CFC concluded that petitioner's takings claim had accrued in May 1998. *Id.* at 50a-52a. The CFC held that petitioner was not entitled to compensation because it had acquired its lease "[s]ubject to the [l]andfill," and had effectively consented to any restriction on its leasehold resulting from the landfill's operations, *id.* at 63a-73a. The CFC explained that petitioner's "contribution to the creation of a landfill containing a hazardous waste site makes the loss of a portion of [petitioner's] property during the remediation of that site a burden which it is fair to allow [petitioner] to bear, rather than shifting [petitioner's] loss to the public as a whole." *Id.* at 72a-73a. As an additional ground for its decision, the CFC also held that mining by petitioner was prohibited by background principles of state nuisance and property law. *Id.* at 73a-113a.

3. The court of appeals vacated and remanded with instructions to dismiss. Pet. App. 1a-40a.

a. Although the government did not argue in the court of appeals that petitioner's complaint was untimely, the issue was raised in a brief filed by an amicus curiae, and petitioner addressed the timeliness of the complaint in its reply brief. See Pet. App. 13a-14a. The court of appeals held that it was required to address the question because 28 U.S.C. 2501 limits the jurisdiction of the CFC. See Pet. App. 15a-20a. The court of appeals acknowledged and distinguished recent decisions of this Court that have held a variety of timing requirements to be non-jurisdictional in character. See *id.* at 17a-18a. The court explained that, "[i]n contrast to a non-jurisdictional claim-processing rule or the statute of limitations in [*Day* v. *McDonough*, 126 S. Ct. 1675 (2006)], section 2501 sets forth a condition that must be met for a waiver of sovereign immunity in a suit for money damages against the United States." *Ibid.* The court also observed that

> the six-year statute of limitations of section 2501 enjoys a longstanding pedigree as a jurisdictional requirement. Since 1883 when [this] Court first held that the statute of limitations was jurisdictional in *Kendall v. United States*, 107 U.S. 123 (1883), [this] Court has consistently maintained that the time limit is jurisdictional and therefore cannot be waived.

*Id.* at 18a (citations omitted).

b. The court of appeals held that petitioner's claim accrued no later than September 1994 and that petitioner's complaint was therefore untimely. Pet. App. 23a-28a. The court stated that the fence erected by EPA in 1994 "destroyed [petitioner's] right to exclude others from its leasehold" and "inhibited [petitioner's] right to use its property free of interference." *Id.* at

24a. The court further explained that the fence remained on the Site from that time forward, even though the fence's precise location was changed from time to time. *Id.* at 24a-25a.

c. Judge Newman dissented. Pet. App. 33a-40a. She would have held that the limitations period established by Section 2501 "is not itself a matter of jurisdiction," *id.* at 33a, and that the timeliness of petitioner's complaint therefore "need not be considered *sua sponte*" when the government did not raise it on appeal, *id.* at 38a. Judge Newman further stated that she "would affirm the holding of the [CFC] that the limitations period had not accrued in 1994, and would reach the merits of the takings claim." *Id.* at 39a. On the merits, she would have affirmed the CFC's judgment on the ground that petitioner was not entitled to compensation because it was aware of the landfill when it acquired its leasehold. *Id.* at 40a.

## ARGUMENT

1. Petitioner contends (Pet. 11-20) that the court of appeals erred in treating the six-year limitations period established by Section 2501 as a jurisdictional rule. That claim lacks merit and does not warrant this Court's review.

a. The court of appeals correctly held that Section 2501 is jurisdictional and cannot be waived by the parties. This Court has repeatedly recognized that "[t]he basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); see *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). Thus,

"the existence of consent [to be sued] is a prerequisite for jurisdiction," *Mitchell*, 463 U.S. at 212, and "the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit," *Sherwood*, 312 U.S. at 586. "When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." *Block*, 461 U.S. at 287.

The court of appeals' conclusion that Section 2501 establishes a jurisdictional rule accords with those general principles and with this Court's consistent treatment of Section 2501 and its statutory predecessors in a series of decisions beginning with *Kendall* v. *United States*, 107 U.S. 123 (1883). In *Kendall*, the Court explained that Congress had restricted the jurisdiction of the Court of Claims to certain classes of cases, and that if a particular claim is not such a case, "it is the duty of the court to raise the question whether it is done by plea or not." *Id.* at 125. The Court specifically identified the statutory time bar as one of the restrictions the court must raise even if it has not been raised by plea. *Ibid.*

Similarly in *Finn* v. *United States*, 123 U.S. 227 (1887), the Court explained:

> The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers

> to waive the limitation imposed by statute upon suits against the United States in the Court of Claims.

*Id.* at 232-233. In *Munro* v. *United States*, 303 U.S. 36 (1938), the Court applied the same rule to a Tucker Act suit in district court where the attorney for the government had failed to plead the six-year bar in a timely manner. Citing *Finn*, the Court held that "[t]he District Attorney had no power to waive conditions or limitations imposed by statute in respect of suits against the United States." *Id.* at 41; see *De Arnaud* v. *United States*, 151 U.S. 483, 495-496 (1894) (quoting *Finn*, 123 U.S. at 232-233); *United States* v. *Wardwell*, 172 U.S. 48, 52 (1898) (stating that the predecessor to Section 2501 was "not merely a statute of limitations but also jurisdictional in its nature, and limiting the cases of which the Court of Claims can take cognizance"); *Soriano* v. *United States*, 352 U.S. 270, 271 (1957) (holding that "the Court of Claims lack[ed] jurisdiction because the claim was not filed within the period provided by the statute"); Pet. App. 18a-19a (citing cases).

For purposes of the question presented here, the text of current Section 2501 is not meaningfully different from the language construed in those prior decisions.[1] The minor modifications adopted by Congress in various amendments to the statute do not suggest an intent to

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[1] The earliest of Section 2501's statutory antecedents provided in pertinent part:

> [E]very claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues.

Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767.

supersede this Court's earlier rulings that the limitations period is jurisdictional in character. To the contrary, the fact that Congress has refined the statutory language in other respects without calling that principle into question is a reason to adhere to this Court's prior construction of the law. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

b. Petitioner acknowledges (see Pet. 11-12) the precedents discussed above but contends (Pet. 12-13) that they have been undermined by this Court's more recent decisions in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), and *Franconia Associates* v. *United States*, 536 U.S. 129 (2002). In neither *Irwin* nor *Franconia Associates*, however, did this Court address the question whether Section 2501 or any other statutory limitations period governing suits against the United States is jurisdictional in nature.

The statutory provision at issue in *Irwin* required that an employment discrimination complaint against the federal government be filed within 30 days of receipt of notice of final action taken by the Equal Employment Opportunity Commission. See 498 U.S. at 92. While recognizing that the 30-day filing requirement was "a condition to the waiver of sovereign immunity and thus must be strictly construed," *id.* at 94, this Court concluded that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States," *id.* at 95-96. The Court stated that "[s]uch a principle is likely to be a realistic assessment of legislative intent as

well as a practically useful principle of interpretation." *Id.* at 95.

This Court's decision in *Irwin* does not speak directly to the question presented here. The Court characterized its decision as adopting a "general rule to govern the applicability of equitable tolling in suits against the Government." 498 U.S. at 95. The Court did not purport to resolve other issues concerning the application of statutory time limits in suits against the government, and it did not discuss the question whether such limits are jurisdictional in nature.

Petitioner's reliance (Pet. 12-13) on *Franconia Associates* is similarly misplaced. The Court in *Franconia Associates* rejected the contention "that § 2501 creates a special accrual rule for suits against the United States." 536 U.S. at 145. Rather, the Court held, the determination of when a claim against the government "first accrues" within the meaning of Section 2501 is governed by the same accrual principles that would apply in a like suit between private parties. See *ibid.* But while the Court expressed the view that "limitations periods should *generally* apply to the Government 'in the same way that' they apply to private parties," *ibid.* (emphasis added) (quoting *Irwin*, 498 U.S. at 95), it did not announce a categorical rule to that effect, and it had no occasion to decide whether a timeliness objection may be waived if the government fails to assert it. In neither *Irwin* nor *Franconia Associates*, moreover, did this Court announce the overruling of any of its precedents—a step that would have been necessary for the Court to hold that the untimeliness of a complaint filed in the CFC may be overlooked if the government does not raise the point.

c. Petitioner contends (Pet. 13-14) that the court of appeals' ruling conflicts with this Court's recent decisions in *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), *Scarborough* v. *Principi*, 541 U.S. 401 (2004), and *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), which held various timing requirements to be non-jurisdictional. The timing requirements at issue in those cases, however, did not pertain to the initiation of a lawsuit, but instead governed various subsidiary determinations made by federal courts in cases that they were indisputably authorized to decide. See *Eberhart*, 546 U.S. at 13 (time limit for filing a motion for new trial under Federal Rule of Criminal Procedure 33); *Scarborough*, 541 U.S. at 405 (statutory provision governing timing and content of application for attorneys' fees by prevailing party in suit against the United States); *Kontrick*, 540 U.S. at 446 (time limit under Bankruptcy Rules for creditor to object to the debtor's discharge). Section 2501, by contrast, speaks to the question whether the CFC may adjudicate petitioner's claims *at all*. It is therefore far more naturally characterized as jurisdictional than were the provisions at issue in *Eberhart*, *Scarborough*, and *Kontrick*.[2]

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[2] As petitioner observes (Pet. 14), this Court stated in *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), that "time prescriptions, however emphatic, 'are not properly typed "jurisdictional."' " *Id.* at 510 (quoting *Scarborough*, 541 U.S. at 414). That statement was dictum, however, since the statutory provision at issue in *Arbaugh* did not impose a time limit. Rather, the Court in *Arbaugh* considered Title VII's definition of "employer," which limits the term to persons with 15 or more employees. See *id.* at 504-505. The Court concluded that "the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief" on the merits rather than a prerequisite to the district court's exercise of jurisdiction. *Id.* at 516; see *id.* at 510-516.

Petitioner also relies (Pet. 14-15) on decisions of this Court holding that statutes of limitations are not ordinarily considered jurisdictional. In *Finn*, this Court acknowledged "[t]he general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions." 123 U.S. at 232-233. The Court explained, however, that this rule "has no application to suits in the Court of Claims against the United States" because "the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims." *Id.* at 233; see pp. 8-9, *supra*. More recent cases that simply reaffirm the general rule therefore do not cast doubt on the Court's prior holdings that the six-year limitations period established by Section 2501 for suits against the United States for a money judgment, unlike limitations periods governing litigation between private parties, is jurisdictional in character.

d. Petitioner contends (Pet. 17-19) that the court of appeals' decision conflicts with rulings of other circuits.[3] Petitioner states (Pet. 17) that other courts of appeals "have construed *Irwin* to mean that compliance with a statute of limitations generally is not a jurisdictional prerequisite to suing the government in the absence of a clear Congressional statement." But while some of the decisions cited by petitioner state that deadlines for bringing suit against the United States are not "juris-

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In the instant case, by contrast, petitioner does not contend that Section 2501 speaks to the merits of its claim.

[3] Petitioner's further assertion (Pet. 15-17) of an intra-circuit conflict provides no basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

dictional," only one of those decisions specifically addresses the question whether a plaintiff's non-compliance with such deadlines may be waived by government counsel's failure to raise the issue.

That case is *Laber* v. *Harvey*, 438 F.3d 404 (4th Cir. 2006), in which the court addressed the same statutory deadline (42 U.S.C. 2000e-16(c)) that was at issue in *Irwin*. The court in *Laber* explained that this Court had construed Section 2000e-16(c) to permit equitable tolling. 438 F.3d at 429 n.25. The court then stated that, "[i]f equitable tolling applies, which it does, the time limits are not jurisdictional, but are rather in the nature of a statute-of-limitations defense." *Ibid.* That conclusory analysis is flawed, since the question whether Congress intended equitable tolling to be available is logically distinct from the question whether a statutory deadline for bringing suit against the United States is jurisdictional and therefore non-waivable. See *Martinez* v. *United States*, 333 F.3d 1295, 1317 (Fed. Cir. 2003), cert. denied, 540 U.S. 1177 (2004).

In any event, *Laber* did not involve 28 U.S.C. 2501, and the Fourth Circuit did not adopt a categorical rule that deadlines for bringing suit against the government are non-jurisdictional. Rather, it treated such deadlines as *presumptively* non-jurisdictional, and found nothing that would rebut the presumption with respect to 42 U.S.C. 2000e-16(c). See 438 F.3d at 429 n.25. Even under that approach, the fact that Congress has repeatedly refined Section 2501 without disturbing this Court's understanding of Section 2501 and its predecessors as jurisdictional would rebut any such presumption here.

e. Petitioner's argument depends on the proposition that, if the six-year limitations period prescribed by Section 2501 is not jurisdictional, the court of appeals was

*precluded* from inquiring into the timeliness of petitioner's complaint when the government failed to raise the point on appeal. That is incorrect. As this Court recognized in *Day* v. *McDonough*, 126 S. Ct. 1675, 1681-1682 (2006), the non-jurisdictional character of a statute of limitations may mean that a federal court has no *obligation* to consider timeliness issues sua sponte, but it does not foreclose the court from doing so. That is particularly true where, as here, the court of appeals would otherwise have been required to decide a constitutional question. See, *e.g.*, *Peters* v. *Hobby*, 349 U.S. 331, 338 (1955). In addition, an amicus curiae argued in the court of appeals that petitioner's complaint was untimely, and petitioner responded to that argument in its Federal Circuit reply brief. See Pet. App. 13a-14a. The government's failure to raise the issue therefore did not deprive petitioner of an adequate opportunity to address the question of its compliance with Section 2501.

f. For the foregoing reasons, the question whether Section 2501's six-year limitations period is jurisdictional in nature does not warrant review by this Court. On March 26, 2007, this Court heard oral argument in *Bowles* v. *Russell*, No. 06-5306. *Bowles* presents the question whether 28 U.S.C. 2107 and Federal Rule of Appellate Procedure 4(a), which limit the time for filing a notice of appeal in a federal civil case, establish a jurisdictional rule.

At a general level, both *Bowles* and this case involve issues concerning whether particular timing requirements are jurisdictional in character. But because *Bowles* does not involve a statutory provision governing the time for filing suit against the United States, the Court should have no occasion to address the question presented here, which is governed by a long series of

decisions of this Court specifically treating the limitation in 28 U.S.C. 2501 and its predecessors as jurisdictional in nature. There is accordingly no reason for the Court to hold the petition in this case pending its decision in *Bowles*.

2. Petitioner contends (Pet. 20-23) that the court of appeals erred in holding that its takings claims was untimely. That argument raises no question of broad legal importance.

a. Petitioner argues (Pet. 20-22) that the court of appeals' decision blurs the distinction between permanent and temporary physical taking claims. The court of appeals correctly recognized, however, that the term "permanent" in this context "does not mean forever, or anything like it." Pet. App. 22a (quoting *Hendler* v. *United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991)). The question whether a governmental presence on private land is sufficiently longstanding and intrusive to constitute a permanent taking is one of degree, and it is not ordinarily resolvable by reference to a bright-line rule. See *id.* at 23a (explaining that the "determination of whether government occupancy is 'permanent' is highly fact-specific"); *Hendler*, 952 F.2d at 1377. Petitioner asserts (Pet. 22) that "[t]he Federal Circuit's analysis overlooks several key facts found by the [CFC]." But any error in the court of appeals' application of established legal principles to the record in this case presents no question warranting this Court's review.

b. Petitioner construes the court of appeals' decision to hold that, "if the government installs objects on some portion of private property, the property owner's taking claim accrues for the government's later permanent occupation of *any other* portion of the property." Pet. 22

(citation and internal quotation marks omitted); see Pet. 22-23. The court of appeals did not adopt any such broad rule. Rather, the court found it decisive that an EPA security fence remained on the Site from 1994 onward. Pet. App. 23a-25a. The court held that "[t]he EPA's willingness to alter the parameters of the fence does not change the fact that the fence itself was permanent in nature." *Id.* at 24a. The court thus concluded that the essential character of the government's incursion on petitioner's right to use its property and exclude others from it remained consistent, even though the degree of that incursion changed over time. That record-specific determination does not warrant this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2007